IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

United States Supreme Court No. 76-925
Court of Appeal No. 2d Civil 47321
Superior Court No. D 64058

RAYMOND W. FERREN,

Petitioner.

v.

GLENA FERREN

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION ONE OF THE STATE OF CALIFORNIA

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Topical Index

Table of Authorities

Cases

U.S. Constitution

Codes

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL SECOND APPELLATE DISTRICT DIVISION ONE OF THE STATE OF CALIFORNIA

The petition of RAYMOND W. FERREN, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeal of the State of California, Second Appellate District, Division One, rendered in these proceedings on August 10, 1976, as modified September 7, 1976 on denial a Petition for Rehearing; and to review the judgment of the California Supreme Court denying Petitioner's Petition for hearing in that court by minute order dated October 7, 1976.

OPINIONS BELOW

The interlocutory judgment of the Superior Court of Ventura County appears at page 167 of the clerk's transcript of the proceedings in Ventura County Superior Court Case No. D 64058, which has been lodged with this Court and marked Appendix A. The Appellant's Opening Brief filed in the Court of Appeal of the State of California has been lodged with this Court and is marked Appendix B. The Respondent's Brief filed in the Court of Appeal of the State of California has been lodged with this Court and is marked Appendix C. The opinion of the Court of Appeal of the State of California filed August 10, 1976 has been lodged with this Court and is marked Appendix D. The petitioner's Petition for Rehearing filed in the Court Appeal of the State of California on August 25, 1976 has been lodged with this Court and is marked Appendix E. The petitioner's Petition for Hearing in the Supreme Court of the State of California filed September 20, 1976 has been lodged with this Court and is marked Appendix F. The Supplemental Petition for Hearing lodged by the petitioner in the Supreme Court of the State of California, but unfiled therein, has been lodged with this Court and is marked Appendix G. The Court of Appeal denied petitioner's Petition for Rehearing Appendix H without opinion and the Supreme Court of the State of California denied petitioner's Petition for Hearing without opinion on October 6, 1976, Appendix I.

JURISDICTION

The order of the Supreme Court of the State of California denying petitioner's Petition for Hearing was entered on October 6, 1976. See Appendix H, lodged with this Court. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The respondent filed her Petition for Dissolution under the provisions of the California Family Law Act, which by its terms requires a valid marriage in order to confer jurisdiction on the Trial Court in said matter. At the time of petitioner's marriage to respondent, respondent was married to one Earl Randolph Ewers and said marriage had not been legally dissolved. That after respondent filed against petitioner in California for dissolution, but before either an interlocutory or final judgment was entered in said matter, her husband, Ewers, filed a complaint for divorce in Virginia, served respondent with process and obtained a final decree of divorce against respondent in Virginia. The California Court thereafter entered a Judgment of Dissolution, finding that the marriage between petitioner and respondent was valid, and making certain other orders with respect to the division of property and alimony. The questions thereby arising are:

1. Whether the California Court had jurisdiction over the subject matter or power to enter said Judgment of Dissolution.

2. Whether the California Court erred in failing to give full faith and credit to the judgment of a sister state in a matter having jurisdictional, procedural and substantive effect in the instant case.

3. Whether the statute providing that the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for Veterans and their dependents or survivors shall be final and conclusive, foreclosed judicial review of the validity of the alleged marriage between petitioner and respondent.

4. Whether the Court erred in refusing to be bound by the Supremacy Clause of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,
ARTICLE VI, SECTION 2:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

CONSTITUTION OF THE UNITED STATES,
AMENDMENT XIV, SECTION I:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

CONSTITUTION OF THE UNITED STATES,
ARTICLE IV, SECTION I:

"Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state . . ."

STATEMENT OF FACTS

Petitioner married respondent, Glena Ferren, in Las Vegas, Nevada, on November 19, 1955. Prior to that marriage respondent had married one Earl Randolph Ewers on July 9, 1949, in Amherst County, Virginia, and at the time of petitioner's Nevada marriage the Virginia marriage had not been legally dissolved, although said Earl Randolph Ewers had, unilaterally, sought a mail-order divorce in Tijuana, Mexico. On June 15, 1972, respondent commenced the within action by filing for a Petition for Dissolution in the Superior Court of California, County of Ventura, Case No. D 64058. (See Appendix A, p. 1). On July 18, 1972, petitioner filed his response contending that the marriage was a nullity. (See Appendix A, p. 10). On October 30, 1973, the Ventura Superior Court made an Order on Order to Show Cause, which followed a Hearing in which petitioner presented evidence that the Administrator of Veterans Benefits had determined on April 11, 1956 that respondent's Mexican divorce was invalid, insofar as the Veterans Administration was concerned. Notwithstanding said evidence, the Court in said Order made a finding that the marriage between petitioner and respondent was valid. (See Appendix A, pp. 26, 81, 82). On March 12, 1974, an Interlocutory Judgment of Dissolution of Marriage was filed inthe Superior Court of Ventura County, pursuant to stipulation. (See Appendix A, p. 167); and on January 30, 1975, a Final Judgment of Dissolution was filed. On February 27, 1975, petitioner filed a Notice of Motion to Quash the Service of Summons, or in the alternate, for dismissal and other Orders alleging that the Court lacked subject matter jurisdiction. (See Appendix A, pp. 205, 206 and 207). In support of said Motion, petitioner filed his

declaration supported by documentary exhibits which established that Earl Randolph Ewers had married respondent on July 9, 1949, in Roanoke, Virginia; had filed a Bill of Complaint for Divorce on August 22, 1973; that the said Bill of Complaint and Subpoena were served upon respondent on August 27, 1973; that on September 17, 1973, respondent defaulted to the action and that on November 8, 1973, a Final Decree of Divorce was entered in the Circuit Court in Roanoke, Virginia, decreeing that Ewers was absolutely divorced from the respondent, and that the bond of matrimony created by that marriage on July 9, 1949, was thereby dissolved. In support of his Motion petitioner contended that the law of Nevada provided that all marriages which were prohibited by law because either of the parties had a former husband or wife then living, if solemnized within that state, were void without any decree of divorce or annulment or other legal proceedings, and that respondent was entitled to full faith and credit with respect to the Virginia Decree. (See Appendix A, pp. 208-230). On June 6, 1975, the Court, in responding to petitioner's Motion filed February 27, 1975, took the position that the thrust of petitioner's Motion appeared to be predicated upon the alleged fraud of the respondent in concealing from petitioner the continued existence of another marriage at the time the proceedings were commenced in Ventura County for Dissolution on June 15, 1972, and held that the Interlocutory Judgment of Dissolution was res judicata to all of the issues presented in the proceedings, and that the "alleged fraud" of the respondent, if any, was intrinsic to the within proceedings. (See Appendix A, p. 258).

The petitioner then appealed the Judgment to the Court of Appeal, contending, among other things, that the Trial Court lacked jurisdiciton over the subject matter; that petitioner had been denied substantive and procedural due process, for the reason that the Lower Court erred in failing to give full faith and credit to the Judgment of a sister state in a matter having jurisdictional, procedural and substantive effect in that case; that the decision of the Veterans Administration was res judicata upon the validity of the Mexican divorce and that the Court erred in refusing to be bound by the Supremacy Clause of the United States Constitution, (See Appendix B), and the respondent filed a Respondent's Brief. (See Appendix C). Thereafter the Court of Appeal affirmed the Judgment by a written but unpublished opinion, (See Appendix D), and petitioner filed his Petition for Rehearing in the Court of Appeal, and Petitioned for Hearing in the Supreme Court. (See Appendix E, F and G).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES PETITIONER DUE PROCESS OF LAW.

In the Courts below, admittedly, the existence or nonexistence of a valid marriage was critical to the question of that Court's jurisdiction to render a valid judgment. Jurisdiction is conferred by law; it is derived from statutory or constitutional provision. In the instant case the Court below was conferred with power to dissolve valid marriages by virtue of the California Family Law Act. That Act specifically sets forth the requirement that there be, in fact and in law, a valid marriage. (See

California Civil Code Sections 4100 & 4506(1). The parties were married in Nevada at a time when the respondent had a husband, then living. Nevada law provides that such marriages are void without any further proceedings, legal or otherwise. (See Nevada Revised Statutes, Volume 5, Section 125.290). In her verified Petition for Dissolution filed in California, respondent did not allege that she was a putative spouse, nor did she allege that there was a defect in the marriage that petitioner was estopped to contest. She alleged that there was a valid marriage. Consequently, petitioner took the position that there was not a valid marriage and that inasmuch as the California Family Law Act required a valid marriage, the Court was without jurisdiction over the subject matter which could not be waived, nor could litigation of that subject confer jurisdiction, and further that jurisdiction over the subject matter was always subject to inquiry and is never res judicata.

The Trial Court's rather arbitrary response to petitioner's contention was to make a finding that "the marriage was valid," although, other than the respondent's bland allegation that the parties were married at a certain time and place, contained in her petition, the fact that she had a living husband at the time of her marriage to petitioner was freely recognized and admitted throughout the entire proceedings. Petitioner's last effort to raise this issue in the Trial Court was defeated by that Court's finding that the issue of a valid marriage was made res judicata by the Interlocutory Judgment, entered according to stipulation of the parties, and perhaps by the Trial Court's finding (supra) of a valid marriage at the

Hearing on the Order to Show Cause; against petitioner's contentions that the stipulation represented only an agreement to agree in the event the Court did have jurisdiction over the subject matter, and that the only evidence before the Court reflected a void marriage.

The response of the Court of Appeal to petitioner's contention was as circuitous as was the response of the Trial Court arbitrary. The Court of Appeal found that the petitioner was estopped to contest the validity of the marriage because he knew all the time that there wasn't a valid marriage in spite of the fact that this was exactly what he had been claiming all along, and in spite of the fact that estoppel was never alleged, litigated or found at any stage of the proceedings. Additionally, that Court found that the petitioner had sought valuable relief from the Court when he filed his response which sought to declare the marriage a nullity, (a relief he never received), and that to allow the petitioner to then contest the jurisdiction of the Court would not be tolerated. The Court of Appeal cited cases in support of this latter proposition, (see **Morrow vs. Morrow,** 40 Cal. App. 2d 474, at page 11 of Appendix D), which were wholly extraneous to the situation of the petitioner. Petitioner did not invoke the jurisdiction and power of the Court for the purpose of securing important rights from his adversary through its judgment, and after having obtained the relief desired, repudiate the action on the ground that it was without jurisdiction. Far from it, as petitioner contested the jurisdiction of the Court from the beginning. The action taken by the Court of Appeal was a patent attempt to sweep petitioner, a voice crying in the wilderness, under the rug. Such tactics should not be condoned or permitted. Estoppel is and should be an equitable doctrine based on what is fair and just under the circumstances.

With all of the foregoing in mind, one might ask, "What else would the petitioner, In Pro Per, have done to properly raise this issue?" He had raised the issue of the lack of jursidiction over the subject matter from the very inception of the case, an issue that went to the very power of the court to issue a valid Judgment, which could not be waived or be made the subject of the doctrine of res judicata.

The obvious predilection of the California judiciary for expedition and summary treatment of individuals seeking fairness and justice within the court dealing in domestic relations underscores the importance of this unconstitutional denial of due process and the need for elaboration of guiding principles by this court.

That the Supreme Court of California is in agreement with petitioner's contentions contained herein was forcefully demonstrated in a landmark decision handed down only December 27, 1976, in **Marvin vs. Marvin,** L.A. 30520, as yet unreported except in the public press. In that case, the plaintiff alleged, in her complaint, an agreement to share earnings while living together. The California Supreme Court rejected the contention that the California Family Law Act governed the property rights of non-marital Cohabitators which law granted each non-marital partner a half interest in the property acquired by the couple. In the Marvin Case, the plaintiff alleged not a valid marriage, but a partnership. In the instant case, respondent alleged a valid marriage under the Family Law Act. It is obvious that the two cases can only be reconciled by a holding that in the case at bar, there exists a lack of jurisdiction over the subject matter.

2. THE DECISION BELOW DENIES PETITIONER'S RIGHT TO FULL FAITH AND CREDIT TO THE JUDGMENT OF A SISTER STATE IN A MATTER HAVING JURISDICTIONAL, PROCEDURAL AND SUBSTANTIVE EFFECT IN THE INSTANT CASE.

Petitioner herein sought relief under the Family Law Act. The grounds for such relief are, among others, irreconcilable differences which have caused irredeemable breakdown of the marriage, (see California Civil Code Section 4506). Both California Law (Civil Code Section 4401) and Nevada Revised Statutes declare a marriage void where it is contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife. It can be noted, at this point, that she did not seek relief under nullity nor did she seek relief as a putative spouse. Consequently, a marriage, under her pleadings, was necessary to jurisdiction of the Court over the subject matter.

The Virginia Court granted a Decree of Divorce to Respondent's husband before the Interlocutory Decree was entered herein, but after the instant proceedings had been commenced Respondent was served with the complaint in said action, but did not file any response thereto, nor did she file, as was her option, a plea in abatement therein. Consequently, for all intents and purposes, Respondent and all in privity with her, were bound by the contents of the Virginia Decree. By implication, the Virginia Court found a valid marriage existed between EWERS and Respondent. The Full Faith and Credit Clause of the United States Constitution (Art IV Sec. 1) bars a party from collaterally attacking a

Divorce Decree on jurisdictional grounds in the Courts of a sister state where there has been participation by the party in the proceedings, where the party has been accorded full opportunity to contest the jurisdictional issues and where the Decree is not susceptible to collateral attack. (see **Sherrer** case, infra). Here it is contended that the California Judgment, herein, denied full Faith and Credit to the Virginia Judgment, contrary to said Constitutional provision. Respondent had her day in Court in Virginia with respect to the issue of the validity of her marriage to EWERS. She was granted due process of law with respect to every issue raised therein, and there is nothing in the concept of due process which demanded that she be given a second opportunity (in the California Court) to litigate the existence of jurisdictional facts. (See **Sherrer vs. Sherrer,** 334 U.S. 343).

The requirements of Full Faith and Credit bar a defendant from collaterally attacking a judgment on jurisdictional grounds in the Courts of a sister state. Here, in the instant case, Respondent is actually, collaterally attacking the judgment in the Virginia action. She does this, not by contending that the Virginia Judgment was invalid, but by contending that the California Judgment was valid. Irrespective of the manner in which she proceeded, the result (effect) is the same. Respondent attacks collaterally the Decree of the Virginia Court. The application of the Family Law Act is limited by the requirement of the Constitution of the United States that Full Faith and Credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. (see California Civil Code, Section 5004). The Lower Court erred herein by not affording Full

Faith and Credit to the provisions of the Virginia Decree. The Virginia Decree found that Respondent was married to EWERS, not Petitioner. The Petitioner had no opportunity to be heard in Virginia, but the Respondent did. Where is the justice in the Lower Court's failure to recognize the contents of the Virginia Decree?

Further, the principle of res judicata demands that the parties present their entire case in one proceeding, (see **Kulchar vs. Kulchar** 1 Cal. 3d 467). Admittedly, the facts of the case at bar present a reverse twist to the usual factual situation in which the issues encountered herein are usually found, yet the principles are the same. The Respondent was found to be married to EWERS in a Virginia case wherein the filing, service of complaint, and judgment were all rendered after filing of the complaint herein, but before Judgment. The issue of the marriage was then determined. Respondent could not have been legally married to EWERS, as found in Virginia, and also to Petitioner. The Petitioner brought the Virginia Decree to the attention of the Lower Court. The Respondent made a collateral attack, and the Lower Court sustained it improperly. The finding of the Virginia Court regarding the marital status of Respondent was res judicata on her disputing the issue in California, (and on Petitioner, for that matter, as being in privity with her). The matter was judicially noticed (see California Evidence Code, Sec. 451) and improperly ignored. Substantive and procedural due process of law has been denied to Petitioner.

The response of the Court of Appeal to the foregoing was a classic example of "looking through a mirror darkly."

The cases cited by the Court of Appeal, (**Rediker v. Rediker,** 35 Cal. 2d 796, 800-802; **Blumental v. Blumental,** 97 Cal. App. 558, 561; and **Estate of Underwood,** 170 Cal. App. 2d 669, 672), do not in any way have application to the point found by the Court of Appeal that Petitioner was a stranger to the Virginia proceeding and was not entitled to "Full Faith and Credit" thereof. The Court of Appeal overlooked the fact that in the cases cited the Court refused to permit the decree to be enforced against strangers to the action giving rise to the decree, and not as in the instant case where a stranger attempts to enforce the decree as to a party. In addition thereto, the Court of Appeal erroneously concluded that the cases cited dealt with "Full Faith and Credit" when in fact the cases cited dealt with decrees obtained in foreign jurisdictions, such as Cuba, and therefore are not afforded "Full Faith and Credit" under the United States Constitution. The Court further overlooked appellant's contention that respondent's "Mexican" divorce was not entitled to such "Credit".

Appellant has conducted and exhausted research programs into all federal and state decisions which relate to this aspect of "Full Faith and Credit", and in every case wherein "Full Faith and Credit" has been denied, it has been denied in a situation wherein the foreign decree has been the subject of an attempt on the part of a party to the foreign decree to enforce that foreign decree against one not a party to such proceeding. The Court's judgment in those cases was obviously influenced against a ruling that would favor enforcement of such a decree against one who was not a party thereto, or against one who had

no opportunity to appear and protect what rights said party may have had in such proceeding. The case at bar presents a complete reverse situation. There are no authorities which are in point. The Court of Appeal erred in attributing to Petitioner the status of the parties seeking to enforce the foreign decree. In the cases cited the persons seeking to enforce the decree were parties. They had control over their destinies in said actions. They were bound by said actions. The strangers to the proceedings were not bound by said decrees when the parties sought to enforce the decrees against the stranger to said actions. This is a far cry from the reverse situation, such as here, where Petitioner seeks to enforce the judgment against a party. Where is the justice in the ruling of the Court of Appeal? It was the respondent who had the opportunity to appear, defend, and protect her rights in the Virginia decree. She did not, and therefore she is bound by that decree and it is res judicata to the proceedings herein, and Petitioner is entitled to "Full Faith and Credit" on said judgment.

Petitioner is prepared to submit an in-depth and detailed analysis of the principles which support his contention as set forth herein, but realizes that the purpose of this petition is to alert the Supreme Court to the errors contained in the decision of the Court of Appeal, and consequently, does not wish to overburden this Court at this time, but is requesting that this Court grant its Writ because there is a vacuum in state authority, and it would well serve the public and the Courts to have this issue determined judicially. Further, it is respectfully submitted, that justice would require that such an obvious failure of comprehension on the part of the Court of Appeal should be corrected.

3. THE DECISION BELOW DENIES PETITIONER THE RIGHT TO RELY ON THE SUPREMACY CLAUSE OF THE UNITED STATES CONSITUTION.

Title 38 U.S.C.A. Section 211 (a) in its pertinent parts provides:

> "The decisions of the Administrator on any question of law or fact under any law administered by the Veteran's Administration providing benefits for Veterans and their dependents and survivors shall be final and conclusive and no other official or any Court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

It is urged that the decision of the Administrator evidenced by Petitioner's exhibit number one (Appendix "A" p. 26) rendered April 11, 1956, finally determined the issue of the validity of the marriage, and that the matter, herein, should have been dismissed by the Lower Court for want of jurisdiction over the subject matter, (see **Ross vs. United States,** 462 Federal Reporter 2d series 618).

The United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

Federal Law under the Veteran's Benefits Act, Section 103, provides that:

> "In determining whether or not a woman is or was the wife of a Veteran, their marriage shall be proven as valid for the purpose of all laws administered by the Veteran's Administration according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the rights to the benefits accrued."

The controlling test is the effect of a State Statute rather than its declared purpose that may render it (or its application) invalid under the supremacy clauses where it frustrates the purpose of a Federal Law, (see **Grimes vs. Hoschler** 12 Cal. 3d 305).

As applied to the instant case, the effect was that a claim by the State Court of jurisdiction to act under the Family Law under the Veteran's Benefit Act, and certainly in the denial of Full Faith and Credit herein.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion.

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION ONE

In re the Marriage of	2d Civil No. 47321
GLENA FERREN,	(Sup. Ct. No. D-64058)
Petitioner and Respondent,	
v.	
RAYMOND W. FERREN,	
Respondent and Appellant.	

APPEAL from judgment (orders) of the Superior Court of Ventura County. Lawrence Storch, Judge. Order

APPEAL from judgment (orders) of the Superior Court of Ventura County. Lawrence Storch, Judge. Order of June 6, 1975 affirmed; appeal from all other orders dismissed.

John Brown, for Respondent and Appellant.

Ritner and Wong and William B. Ritner, for Petitioner and Respondent.

Raymond W. Ferren appeals from order (June 6, 1975) denying his motion to vacate interlocutory and final judgments and to dismiss the action and from order (May 5, 1975) adjudging him in contempt for failure to pay child support, order (June 6, 1975) granting continuance on another contempt proceeding and order (June 23, 1975) denying motion for further findings of fact and

conclusions of law.[1] This is a judgment roll appeal; although the issue of the validity of appellant's marriage was litigated on hearing on order to show cause wherein the parties both represented by counsel testified, documentary evidence was received and the court heard argument and determined the issue adversely to appellant, no reporter's transcript of any of the oral proceedings in included in the record. However, a review of the record before us compels our conclusion that the order of June 6, 1975, was proper.

On November 7, 1955, Glena, petitioner and respondent herein, was divorced in Mexico by Earl Ewers, Jr. Twelve days later, on November 19, 1955, Glena and appellant were married in Las Vegas. Subsequently appellant applied for Veteran's benefits, and received a letter dated April 11, 1956, from the Veteran's Administration stating that a decision had been made by its legal section that Glena's Mexican divorce decree was invalid precluding it from making payment of an educational allowance for her benefit. Two children were born of Glena's marriage to appellant, on March 5, 1959, and April 19, 1961.

1 Appellant has failed to pursue his purported appeal from or submit any argument as to the May 5, June 6 and June 23, 1975, orders. Said appeal is deemed abandoned. (**Bauer v. Merrigan**, 206 Cal. App. 2d 769, 721.) Moreover, no appeal lies from order adjudging appellant in contempt. (**John Breuner Co. v. Bryant**, 36 Cal. 2d 877, 878.)

On June 15, 1972, Glena filed petition for dissolution of marriage alleging that she and appellant had been married on November 19, 1955; on July 18, 1972, appellant filed his response thereto for "nullity of the marriage pursuant to Civil Code section 4401 (1)."[2] The order to show cause seeking temporary custody and support orders was heard on August 11, 1972, at which time appellant contested the validity of his marriage. Appellant testified and offered copy of Veteran's Administration letter of April 11, 1956 (Exh. 1). After hearing all of the evidence the court found "the marriage was valid" and made temporary custody, child support, spousal support and other orders. Thereafter numerous proceedings were had, i.e., interrogatories, investigation by the probation officer of child custody, orders to show cause, motions, etc., during which appellant continued to challenge the validity of his marriage. After the custody investigation was completed, and on October 30, 1973, an order on the order to show cause (heard August 11, 1972) was entered; among other things the court again found that "the marriage was valid." On December 28, 1973, appellant filed notice of appeal from this order and others.

2 Section 4401, Civil Code provides in pertinent part: "A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless: [§] (1) The former marriage has been dissolved or declared a nullity prior to the date of the subsequent marriage."

On March 8, 1974, the parties signed a Marital and Property Settlement Agreement wherein appellant admitted they "were married on November 19, 1955, and ever since have been and are husband and wife," and agreed to disposition of the property on the basis of a valid marriage status; Glena therein waived spousal support after April 21, 1979, and her right to appellant's pension, credit union, stock and investments in 12 fruit ranches. On the same day (March 8, 1974) appellant entered into Stipulation and Waiver therein agreeing that upon request of either party the court could hear the dissolution as an "uncontested matter" and incorporate the property settlement agreement in the interlocutory decree, and waiving findings of fact and conclusions of law, notice and all rights of appeal. At the same time appellant entered into a stipulation abandoning his appeal from the October 30, 1973, order. On March 12, 1974, the dissolution was granted and an interlocutory decree incorporating the property settlement agreement was entered. Final judgment was entered January 30, 1975.

On February 27, 1975, appellant filed "Notice of Motion To Quash The Service Of Summons, Or In The Alterntive, For Dismissal" per Rule 1234, Family Law Act, claiming lack of subject matter jurisdiction on the ground his marriage to Glena was invalid because she and Ewers were married until November 8, 1973, when Ewers obtained a final judgment of divorce from her in Virginia; said Virginia decree was res judicata and he was fraudulently induced to execute the property settlement agreement. On May 5, 1975, appellant was adjudged in contempt for failure to pay support. On June 6, 1975,

after a hearing on appellant's February 27, 1975 motion, the court entered its order denying motion to vacate interlocutory and final judgments and to dismiss the action,[3] finding that "at all times" appellant was aware of the marriage between Glena and Ewers and of the Mexican divorce of November 7, 1955, and that the alleged fraud, if any, was intrinsic and appellant made no showing that the alleged fraud was extrinsic depriving him of the opportunity to defend the proceeding. It is this order appellant herein challenges. Appellant's motion for further findings of fact and conclusions of law and reconsideration of this order was denied June 23, 1975.

It is appellant's position that he is entitled to equitable relief against the judgment of dissolution of marriage by virtue of extrinsic fraud on the part of Glena and her breach of fiduciary duty; the court granting the dissolution had no subject matter jurisdiction; and the court in denying his motion to vacate denied him due process of law because it failed to give full faith and credit to the November 8, 1973, Virginia divorce decree and failed to hold that the determination of the Veteran's Administration that the November 7, 1955 Mexican divorce decree was invalid forecloses judicial review of the validity of his marriage.

3 Inasmuch as appellant failed to timely file his motion to quash service (he having been served with petition and summons on June 15, 1972 [§418.10, Code Civ. Proc.]) and made a general appearance on August 11, 1972, waiving his right to make such motion, the court apparently treated said motion as one to vacate the judgment on the grounds that it was void because of a jurisdictional defect and as the result of fraud.

The interlocutory judgment of dissolution entered March 12, 1974, is res judicata as to all issues determined in that proceeding (**Estate of Williams,** 36 Cal. 2d 289, 292) including the validity of appellant's marriage. To warrant relief from this judgment a showing of extrinsic fraud which deprived appellant of a fair adversary hearing must be made. (**Swain v. Swain,** 250 Cal. App. 2d 1, 11; **Deyl v. Deyl,** 88 Cal. App. 2d 536, 543; **Godfrey v. Godfrey,** 30 Cal. App. 2d 370, 379.) "Relief is denied, however, if a party has been given notice of an action and has not been prevented from participating therein. He has had an opportunity to present his case to the court and to protect himself from mistake or from any fraud attempted by his adversary. [Citations.] . . . Courts deny relief, therefore, when the fraud or mistake is 'intrinsic'; that is, when it 'goes to the merits of the prior proceedings, which should have been guarded against by the [party] at that time.' [Citations.] [§] Relief is also denied when the complaining party has contributed to the fraud or mistake giving rise to the judgment thus obtained." (**Kulchar v. Kulchar,** 1 Cal. 3d 467, 472-473.)

Appellant claims that the fraud which prevented him from litigating the issue of his marriage status at a trial was Glena's failure to inform him of the fact that Ewers had sued her for a divorce in Virginia and obtained a decree in 1973; and that had she told him of the decree he would not have entered into the property settlement agreement and stipulation and waiver. The claim is without merit for a variety of reasons the least of which is the obvious fact that if appellant's marriage is a nullity it is so because of the invalidity of the 1955 Mexican

divorce decree not because of the entry of the Virginia decree in 1973; and the validity of his marriage to Glena has been raised by appellant from the outset of the dissolution proceedings and litigated to the court. The record show that when he married Glena appellant knew she had been married to Ewers and that Ewers had obtained a Mexican divorce 12 days before (indications are that appellant participated in procuring that divorce so he could marry Glena); and that as early as April 11, 1956, when he received the letter from the Veteran's Administration, he was placed on notice concerning his marital status and of the possibility that the Mexican decree was invalid. Thereafter at every opportunity from the very beginning of the proceedings, appellant raised and litigated the issue in the trial court.

Appellant sought the jurisdiction of the court for the purpose of having his marriage declared a nullity (response to petition for dissolution of marriage), and on the order to show cause (August 11, 1972) urged the invalidity of his marriage offering his own testimony in that respect and a letter (April 11, 1956) from the Veteran's administration, on which issue, after hearing the evidence, the court ruled adversely to him; subsequently he filed notice of appeal therefrom. On numerous occasions on various orders to show cause, motions, points and authorities, etc., he continued to raise the issue. Then appellant again sought the jurisdiction of the court by entering into a property settlement agreement (wherein he admitted he and Glena were husband and wife) and stipulation and waiver)consenting to an uncontested hearing on the dissolution). He could have had a trial on the issue and if

unsuccessful, he could have appealed from the judgment but instead entered into the agreement and stipulation. By his conduct and stipulation and agreement appellant is estopped from challenging the conclusiveness of the judgment, asserting the court lacked jurisdiction and urging the invalidity of his marriage. (**Rich v. Silver,** 226 Cal. App. 2d 60, 64-66; **Swain v. Swain,** 250 Cal. App. 2d 1, 8-9; **Morrow v. Morrow,** 40 Cal. App. 2d 474, 485.) The case for estoppel is greatly strengthened where the stipulation or agreement made in a judicial proceeding has been acted upon and the adverse party would be injured if it were not given effect. (**Rich v. Silver,** 226 Cal. App. 2d 60, 64-66.) Said the court in **Rich v. Silver,** 226 Cal. App. 2d 60, quoting from **Morrow v. Morrow** at page 485: " ' " 'A party cannot invoke the jurisdiction and power of a court for the purpose of securing important rights from his adversary through its judgment and, after having obtained the relief desired, repudiate the action of the court on the ground that it was without jurisdiction. The question whether the court had jurisdiction either of the subject-matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct not because the judgment in conclusive as an adjudication, but for the reason that such a practice cannot be tolerated.' " ' " (P. 65.)

In **Godfrey v. Godfrey,** 30 Cal. App. 2d 370 appellant claimed the divorce decree had been procured by fraud and the court was without jurisdiction to dissolve the marriage by reason of the fact that the marriage was void **ab initio.** He had been served with process in the divorce action and suffered default but only after talking to counsel about the case. The court held there was no

extrinsic fraud because appellant had an opportunity to be heard and that by his conduct he was estopped from disputing the validity of the marriage. Said the court at page 379: "Extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such false representations as will prevent a real trial of the cause upon the merits of the issues involved . . . ." Also apposite is **Deyl v. Deyl,** 88 Cal. App. 2d 536. The court therein stated at page 543: "If appellant was fully advised about the marriage status between defendant and Tarzia at the time of the trial when he permitted the matter to go by default then, **a fortiori,** no fraud has been committed upon him and in the absence of any facts showing the existence of extrinsic fraud he is estopped, by reason of his own conduct, from challenging the conclusiveness of the decree and the validity of genuineness of his marriage."

Here there is no evidence of extrinsic fraud because not only was appellant not prevented from presenting the issue to the court (**Swain v. Swain,** 250 Cal. App. 2d 1, 11) but he litigated the issue of his marital status at every opportunity. But even assuming Glena's concealment of the Virginia decree as claimed by appellant, such conduct at most would be intrinsic fraud because the fact that Glena had been married to Ewers goes to the merits of the prior proceeding. (**Kulchar v. Kulchar,** 1 Cal. 3d 476, 472-473.) However, there are other factors bearing on appellant's contention. From the unauthenticated documents offered by appellant, it appears that Glena was served with the Bill of Complaint in the Virginia proceedings on August 27, 1973, and that the decree therein was entered November 8, 1973, some months

prior to the entry of the interlocutory judgment in the within cause (March 12, 1974). Although the record shows that appellant generated some activity based on this decree such as writing letters to counsel, nothing in the record reveals when he first learned of the Virginia proceeding. As far as we know appellant could have been aware of the proceeding long before he entered into the property settlement agreement. Moreover while the same unauthenticated documents show service on Glena of a Bill of Complaint, there is not the slightest suggestion that she participated in the proceeding personally or by counsel or even knew that a divorce decree ultimately had been granted; and nothing in the Bill of Complaint appears to provide any information relevent to any issue herein which was not already known to appellant inasmuch as he was always aware of Glena's marriage to Ewers and always maintained that his marriage to Glena was invalid.

Contrary to the contention of appellant, the Virginia decree, having been obtained by Ewers without any participation of Glena, is not res judicata herein on the issue of the validity of appellant's marriage. At most, as between the parties to the action (Glena and Ewers) the Virginia decree adjudicated that on the date of entry (November 8, 1973) they were no longer married to each other, and is res judicata on their status with relation to each other; but it did not adjudicate as to strangers or as between a party to the divorce action and a stranger that previously thereto the marital status existed between Glena and Ewers. (**Rediker v. Rediker,** 35 Cal. 2d 796, 800-802; **Blumental v. Blumental,** 97 Cal. App. 558, 561.) Further, the fact that Ewers later procured a Virginia

divorce does not alone show invalidity of the Mexican divorce and is not res judicata of the continued existence of the first marriage to the date of the second divorce. (**Rediker v. Rediker,** 35 Cal. 2d 796, 800-804; **Estate of Underwood,** 170 Cal. App. 2d 669, 672.) In **Rediker v. Rediker,** 35 Cal. 2d 796, the court held that the fact that defendant's first wife Bessie obtained a final divorce in Florida subsequent to his marriage to plaintiff after he obtained a divorce from Bessie in Cuba, does not result in a determination affecting the validity of the marriage between defendant and plaintiff; and the uncontested final divorce decree obtained by Bessie in Florida does not invalidate the prior Cuban divorce decree obtained by defendant. In the case at bench not only did the Virginia court not deal with the Mexican decree, but the validity of the Mexican divorce had been litigated in California on the order to show cause and the court had found appellant's marriage to Glena based thereon to be valid.

Finally, appellant argues that the determination of the Veteran's Administration in April 1956 that the Mexican decree was invalid for benefit purposes is a determination that his marriage to Glena is invalid for all purposes herein. The determination of the Veteran's Administration was not an adjudication by a court, and if there was any substance to appellant's contention it would violate due process in depriving Glena of the right to a trial by a court or jury. Moreover 38 U.S.C.A., § 211, relied on by appellant, applies only to determinations of Veteran's Administration benefits, and its purpose is to preclude the courts from modifying or overturning decisions as to those benefits. (**Joseph v. United States** (7 Cir. 1974) 505 F. 2d 525, 527; **Radio Television Training**

Association v. United States (1958) 163 F. Supp. 637, 641-642.) Nor is there merit to the claim that allowing a state court to make factual findings at variance with those of the Veteran's Administration would frustrate the federal statute. The court's finding herein that appellant's marriage is valid can have no effect on the decision of the Veteran's Administration not to award benefits.

The order of June 6, 1975, is affirmed; the purported appeal from all other orders is dismissed.

LILLIE, Acting P.J.

We concur:

THOMPSON, J.

HANSON, J.

Proof of Service

STATE OF CALIFORNIA)
ss
County of Riverside)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On January 3, 1977 I served the within PETITION FOR A WRIT OF CERTIORARI on the interested parties in said action, by placing a true copy in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

Court of Appeal
Second Appellate District
3580 Wilshire, Room 301
Los Angeles, California 90010

Clerk of the Superior Court
County of Ventura
501 Poli Street
Ventura, California 93001

William B. Ritner, Esq.
166 N. Moor Park Road
Suite 105
Thousand Oaks, California 91360

I CERTIFY under penalty of perjury that the foregoing is true and correct.

EXECUTED on January 3, 1977, at Santa Ana, California.

JACK GALLAGHER